IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY LEE DEBARD,	
Appellant,	
v.	No. 20,817
UNITED STATES OF AMERICA,	
Appellee.	

APPELLANT'S REPLY BRIEF

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I. THE DISTRICT COURT ERRED BY ADMITTING THE TESTIMONY OF AGENT RAUCH WHICH TESTIMONY CONCERNED ITEMS SEIZED AS A RESULT OF AN ILLEGAL SEARCH OF APPELLANT'S HOME.

Appellant in his opening brief urged that there was error in admitting the testimony of Special Agent Rauch principally because portions of Mr. Rauch's testimony was drawn from information obtained during a search of Appellant's home, which search Appellant argues was conducted in violation of the Appellant's rights under the Fourth and Fifth Amendments to the United States Constitution. Appellee, however, in his brief, suggests that all was proper in that an arrest warrant had previously been obtained and that once the arrest was effected a search thereafter would be valid as a search "incident to lawful arrest." (Brief of Appellee, hereafter referred to as BA, 5)

In other words, Appellee, in his argument, fails

to reach the very issue of the application of the law to the facts of this case. For it is conceded that a search without a warrant may be proper when committed "incident to lawful arrest", but implicit in such an exemption is the recognition that the arrest is performed while in "hot pursuit" as distinguished from the present situation in which Appellant is invited to return to his own home for the purposes of arrest even though the Appellant offers to turn himself into the appropriate officials away from his home. The issue which here seems overlooked is that no warrant had theretofore been obtained seeking authority to conduct a search on the very premises to which the agents had gone for the purpose of making the arrest. And it is nowhere denied by Appellee that the time and even the opportunity for obtaining a valid search warrant was not available. To support the search and seizure in the instant case is to defeat the protection established by the requirement for showing cause for obtaining a search warrant.

Additionally, Appellee would have the court refer to the case of Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, (1967) on the matter of whether or not a search may be conducted for mere evidence alone. We submit that such a new rule ought not held to be retroactive, for where the Appellee relies upon the Johnson case,

Johnson v. New Jersey, 384 U.S. 719 (1966), to hold that Miranda decision, Miranda v. Arizona, 384 U.S. 436 (1966), is not applicable to trials which began prior to the Miranda decision (BA:9), so then, by way of consistency ought Appellee to be bound to pre-Hayden rules, and specifically here the rule that denied a search in 1965 solely for the production of evidence wherein no prior search warrant was obtained. As pointed out in the Appellant's Opening Brief, the agents here were not truly seeking instrumentalities of a crime, nor contraband, but rather mere evidence.

Furthermore, the Fourth Amendment to the United States Constitution does not require police officers to delay in the course of investigation if to do so would gravely endanger their lives or the lives of others. Warden v. Hayden, 387 U.S. 294 (1967), while in the reasons for the search as offered by Appellee in this case there is no showing that there was any such urgency relating to danger to life justifying a warrantless search. It is noteworthy that in the Hayden case the warrantless arrest was made upon a fleeing robber, whereas in the instant case the arrest was made coolly upon a non-hostile, non-fleeing arrestee.

In the instant case, officers were present in Appellant's home for two hours where the Appellant was

not present, yet there is no showing of probable cause that a felony was being committed in their presence at the time of the arrest in February 1965 where the indictment referred to an allegedly illegal transportation in May or June of 1964. Nor was any evidence introduced which would support a cause for belief that a felony was being committed by Appellant at the time of his arrest.

It yet appears that if the government may rely upon a broad interpretation to permit them to arrest where they please and search as "incident to the arrest" without bothering with the formalities of applying for a search warrant where time does so permit, this procedure is to in effect render nugatory any requirement for a search warrant, following an arrest. Thus creating almost an open field day for officers to obtain an arrest warrant, search, and then declare no need for a search warrant. Why then even bother with the arrest warrant?

We submit such liberality of permitting a warrantless search when applied here would support a conviction based upon a search over which constitutional safeguards have by trick or stratagem and choice ignored the very intent of the constitutional safeguard against an unwarranted search.

The search here must be examined in light of United States v. Rabinowitz, 339 U.S. 56 (1950), upon which Appellee also relies (BA:5). If applied to the facts in the instant case the Rabinowitz case would deny the validity of this search as one incident to lawful arrest in that the technique applied by the arresting officers here constituted an unreasonable vehicle for any warrantless search. It is to be remebered in this matter that there had been an arrest warrant issued the prior day and no showing was made before or at the trial as to why no search warrant was sought. Had the arrest been at the Appellant's place of employ, or in front of his home, or at the police station where Appellee offered to meet the agents, no such search of Appellant's home would be justified short of a warrant for a search. Yet by waiting inside Appellant's home for his return is to create a fortuitous situation in the hopes of proceeding in the absence of a warrant. To argue that no officer would be fool enough to permit Appellant to turn himself in at Appellant's convenience as Appellant had offered is to overlook the practical matter that Appellant upon hearing by telephone that he was to be placed under arrest, could well have fled and not returned home to face the warranted arrest and the unwarranted search.

In Rabinowitz, the arresting official was armed

with a valid arrest warrant for one charged with selling and having in his possession forged and altered government stamps. The five justices who formed the majority opinion permitted this search as incident to lawful arrest not because of the warrant but because the officers here had probable cause to believe that a felony was being committed in their presence. In Appellant's case, however, there was no showing by arresting officers, or anyone, of a probable cause that a felony was being committed in their presence at the time of the arrest in February, 1965. The arrest followed from an indictment referring to the alleged unlawful transportation in May and June of 1964.

The point remains that at the time of the search, a warrant for mere evidence should not have been granted to the arresting officers, for a warrant would not then issue for mere exploration to uncover evidence. See Davis v. U.S., 328 U.S. 582. Why should the Appellee be allowed to have accomplished by indirection (deliberate search of premises following an alleged arrest and without benefit of an appropriately obtained search warrant) that which the Constitution and cases thereunder specifically prohibit?

We submit that any data, records, or other items recovered by the search, and referred to in the testimony of the agent as items having been observed at the premises,

as well as the testimony later describing the relationship between the records and magazines, et al. and the nature of the charges facing the Appellant, ought not to have been admitted and that the admission thereof of such testimony was by its nature unfairly prejudicial to the hearing in this matter. In short, it was improper for the District Court to have admitted any such evidence resulting from the search conducted in this case upon the premises of the Appellant at the time of Appellant's arrest.

II. THE GOVERNMENT'S FAILURE TO RECORD TESTIMONY DURING GRAND JURY PROCEEDINGS DID NOT DEPRIVE APPELLANT OF A FULL AND FAIR TRIAL.

During the trial, Appellant had requested a transcript of the testimony given by WANDA BRATSOULEAS before the Grand Jury (TR 167-169). The purpose of such request was suggested at trial where said witness Bratsouleas changed her story on several occasions upon direct examination alone, leaving her credibility subject to reasonable challenge (TR 36-37). It would be pertinent for corroboration and/or impeachment, for the jury to observe the relationship between what she said at the time of the Grand Jury and what she said months later at the trial. The request was denied when it was learned that no such record had been kept (TR pp 167-169).

It is submitted that the Appellant was unduly prejudiced wherein the rule which permits the examination

Grand Jury testimony (See U.S. v. Giampa, (1961) 290F.2d 83) is ignored by the application of an alleged policy in this District that does not require the taking of such testimony.

Appellant was not present at the Grand Jury hearings and cannot know whether testimony was taken in transcript. How easy it would be, however, for testimony to be taken in all cases, but retained only when deemed advantageous to the government. That other Circuits have established that the government has no obligation to record Grand Jury testimony does not appear persuasive in determining prejudice to an accused.

It may be asked how could one think so ill of government procedures? In this very case a letter was addressed to the F. B. I. agent by the chief presecution witness, the victim, the prostitute (TR 190-193). When defense counsel asked at trial for a copy of this he was told that the letter was destroyed; the agent didn't think it was important to keep. Thus when counsel for Appellee indicates at footnote 45 of his brief that we were provided a copy of the witnesses' previous statements to agents of the F. B. I. he misleads this honorable Court, for her previous letter to the agent was destroyed rather then produced.

We urge that the keeping of Grand Jury minutes is a necessary safeguard against a witness, such as in this

trial, who has changed her testimony 180 degrees within a ten minute period exclusively on direct examination. Then how reliable was an indictment based upon such a witness's story? or a conviction?

Counsel for Appellee would have us at least show cause for production of such records, after already having conceded that with or without cause no such record was available. The Judge, without reference to any such cause however, disposed of the objection on the mere non-availability of any such record (TR 167). Furthermore, the cause was stated at the trial by counsel for Appellant in indicating that such transcript was required for purposes of impeachment (TR 168).

Finally we note that Counsel asks that we take another route if we are unsatisfied with the procedures by which Grand Jury minutes may or may not be recorded at the whim of the U. S. Attorney, namely, that we take the matter up with the U. S. Attorney, for the Northern District of California (Cecil Poole). But we here urge that whatever remedies are available to one to improve fairness in the administration of justice, do not in any way preclude this Court from properly finding that until such cure is imposed by law, an Appellant is nevertheless entitled to a consideration by this Court of whether or not the absence of such testimony, and/ or a record thereof, is harmful and prejudicial to the substantial rights

of a defendant.

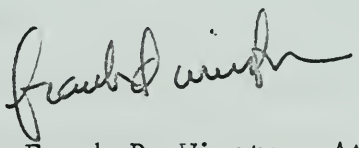
We submit that the lack of availability of a transcript of testimony of Grand Jury proceedings which testimony is properly requested denies to an Appellant a fair trial, and as applied in this case constitutes cause for reversal of the conviction and judgment below.

III. CONCLUSION

For these reasons and those set forth in Appellant's Opening Brief Appellant respectfully submits that the judgment of the Court below ought be reversed, and the charge against said Appellant be hereby dismissed.

Respectfully submitted,

WINSTON & KATZ



By Frank D. Winston, Attorney

Dated: October 27, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

WINSTON & KATZ

By Frank D. Winston
Attorney for Appellant

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party of the within above entitled action; my business address is 986 Mills Building, 220 Montgomery Street, San Francisco, California. On October 30, 1967, I served three copies of the within Appellant's opening brief on the Appellee in said action, by placing 3 true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at San Francisco addressed as follows:

United States Attorney
450 Golden Gate Avenue
San Francisco, California

Attn: Jerrold Ladar, Esq.
Assistant United States Attorney

I certify (or declare), under penalty of perjury, that is true and correct. Executed on 30 October, 1967 at San Francisco, California, /s/ Joan Graham